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No. 04-593

In the Supreme Court of the United States

DOMINO'S PIZZA, LLC, DOMINO'S PIZZA, INC., AND DEBBIE PEAR,

PETITIONERS,

v.

JOHN MCDONALD,

RESPONDENT.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR PETITIONERS

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QUESTION PRESENTED

In the absence of a contractual relationship with the defendant, are allegations of personal injuries alone sufficient to confer standing on a plaintiff pursuant to 42 U.S.C. § 1981?

RULE 29.6 STATEMENT

Petitioner Domino's Pizza LLC, a Michigan limited liability company, is the successor-in-interest to Petitioner Domino's Pizza, Inc., formerly a Michigan corporation.

Neither Petitioner is publicly traded. The ultimate parent company of Domino's Pizza LLC is Domino's Pizza, Inc. (a different entity from Petitioner Domino's Pizza, Inc., which no longer exists), a Delaware corporation, that is publicly traded.

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OPINIONS BELOW

The opinion of the U.S. Court of Appeals for the Ninth Circuit (Pet. App. 1-2) is unpublished. The order of the U.S. District Court for the District of Nevada granting Petitioners' motion to dismiss (Pet. App. 3-7) is unpublished.

JURISDICTION

The Ninth Circuit denied Petitioners' motion for rehearing on August 2, 2004. Pet. App. 8. The petition for a writ of certiorari was filed on November 1, 2004 and was granted on April 25, 2005. 125 S. Ct. 1928. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

42 U.S.C. § 1981 provides:

§ 1981. Equal rights under the law

(a) Statement of equal rights. All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

(b) "Make and enforce contracts" defined. For purposes of this section, the term "make and enforce contracts" includes the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship.

(c) Protection against impairment. The rights protected by this section are protected against impairment by nongovernmental discrimination and impairment under color of State law.

STATEMENT OF THE CASE

Petitioners Domino's Pizza, LLC and Domino's Pizza, Inc. ("Domino's") had contracts with non-party JWM Investments, Inc. ("JWM"), under which JWM agreed to build restaurants and lease them to Domino's. Respondent John McDonald is the president and sole shareholder of JWM. After Domino's terminated its contracts with JWM, McDonald sued Domino's *in his individual capacity*. He relied on 42 U.S.C. § 1981, which guarantees to every person the right "to make and enforce contracts" free from racial discrimination, even though he was not personally a party to any contract with Domino's.

The Ninth Circuit held that this lawsuit could proceed because McDonald alleges "individual" injuries such as emotional distress. But an allegation of injury alone is not enough. When a plaintiff sues pursuant to a federal statute, he must also demonstrate that the statute grants persons in his position a right to judicial relief. The Ninth Circuit completely failed to analyze whether McDonald has statutory standing to sue, or for that matter whether he has any federal cause of action. The Ninth Circuit's holding conflicts with every other court that has confronted this issue under § 1981, and threatens to unleash a flood of litigation by plaintiffs who have suffered no injury to the right—to "make and enforce contracts"—that § 1981 actually protects. This Court should reverse the judgment below and direct that the case be dismissed.

Respondent's Allegations

Because the district court granted Domino's motion to dismiss, the following summary assumes that the allegations in McDonald's complaint are true. *See, e.g., Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit*, 507 U.S. 163, 164 (1993).

Domino's and JWM signed four contracts. Pet. App. 11. JWM agreed to acquire real estate, construct four Domino's

restaurants, and then lease the restaurants to Domino's. The only parties to the contracts were Domino's and JWM. McDonald acknowledges that his role with respect to the contracts was solely as agent for JWM. *See* Pet. App. 11 ("McDONALD in his capacity as President of JWM Investments"); Pet. App. 15 ("McDONALD acting for JWM").

The first restaurant was allegedly completed within the timeframe specified in the contracts. The second encountered a variety of problems, including difficulties with city zoning. These problems led to delays in construction, and the relationship between JWM and Domino's "soured." Pet. App. 12.

According to McDonald, the contracts between JWM and Domino's stated that Domino's would execute "estoppel certificates" for JWM if necessary for financing and/or sale purposes.[1] McDonald alleges that Domino's employee Deborah Pear Phillips ("Phillips") refused to sign such requests by JWM. McDonald also alleges that Phillips called the Las Vegas Valley Water District and removed JWM's name as landowner, requiring him to go in person to prove ownership. Pet. App. 12; *see also* Brief in Opposition to Certiorari at 2 (clarifying that the property was titled in JWM's name, not McDonald's).

McDonald and Phillips then had a telephone conversation in which they discussed the problems that had arisen. Pet. App. 12. McDonald claims that he expressed an intention to complete the projects, but that Phillips told him she would see to it that he would experience financial

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[1] An "estoppel certificate" is a tenant's written description of its interest in property, which enables prospective mortgagees or purchasers to evaluate the nature and extent of the tenant's interests. *See, e.g., Sulmeyer v. Sycamore Inv. Co. (In re Aslan)*, 909 F.2d 367, 369 n.2 (9th Cir. 1990) ("A certificate of estoppel is a tenant's warranty as to the terms of a lease, and thus would enable [the purchaser of the property] to estimate the cost of ousting or keeping a tenant.").

repercussions if he continued. Phillips allegedly told McDonald that "I don't like dealing with you people anyway." Pet. App. 12-13. She also allegedly stated that she would see to it that Domino's did no further business with McDonald. Pet. App. 13.

From that point on, McDonald's calls to Domino's were forwarded to Joel Graziani in the general counsel's office. Graziani told McDonald that, notwithstanding Phillips's alleged comments, Domino's was prepared to sign the estoppel certificates and move forward with the projects, but only if the lease contracts were amended. Pet. App. 13. The contracts were not amended, and the relationship between Domino's and JWM deteriorated until Domino's ultimately terminated the contracts. Although Domino's adamantly denies the charge, McDonald alleges that Domino's decision to terminate its contracts with JWM was motivated by racial discrimination because McDonald is African-American. Pet. App. 14, 16. He also alleges that JWM had various financial difficulties after the termination of the JWM-Domino's contracts, leading to JWM's eventual bankruptcy. Pet. App. 13-14.

As McDonald acknowledged in his briefs to the Ninth Circuit, JWM brought *its own* claim against Domino's arising from this contract dispute during JWM's Chapter 11 bankruptcy proceedings in 2001. Plaintiff-Appellant's Opening Brief in the Court of Appeals at 4; *see also* Stipulation Settling Adversary Proceeding in *In re JWM Investments, Inc.*, Case No. 00-19303-LBR11 (Bankr. S.D. Nev.), attached as a supplement to Plaintiff's Opposition to Motion to Dismiss, at Defendants-Appellees' Excerpts of Record 29-32. Domino's settled that claim for $45,000 in exchange for a complete release from JWM, and the bankruptcy court accepted the settlement. *Id.*

After settling the claim brought on behalf of JWM, McDonald filed this lawsuit against Domino's in his

individual capacity. His complaint alleges a violation of 42 U.S.C. § 1981, which protects the right "to make and enforce contracts" free from discrimination. His complaint does not describe any contract to which he was a party, or any contractual right or interest *personal to him* that he believes was injured. The complaint repeatedly acknowledges, for example, that the only contracts at issue were between JWM and Domino's. *See* Pet. App. 12 ("The contracts between JWM and Domino's stated ...."); Pet. App. 14 ("the contract with JWM"); *id.* (Domino's employees acted "to breach the contracts between JWM and DOMINO'S"). Up to and including his briefs to the Ninth Circuit, McDonald's sole theory of relief has been that he should be permitted to recover for "individual" injuries that he allegedly suffered incident to the termination of the JWM-Domino's contract. Specifically, he alleges that he suffered "pain and suffering, emotional distress, and humiliation." Pet. App. 16. Although his complaint cursorily lists "front pay" as an item of damages, Pet. App. 17, he has never claimed that he was employed by JWM or that JWM paid him a salary.

The District Court's Dismissal

Domino's moved to dismiss the complaint under Federal Rule of Civil Procedure 12(b)(6) on the ground that McDonald lacked statutory standing to sue. Domino's argued that 42 U.S.C. § 1981 protects the contractual relationship and, since McDonald was not a party to the contracts at issue, his allegations of injury were not covered by the statute.

The district court agreed, holding that "[b]y its terms, section 1981 protects the contractual relationship itself and therefore limits the class of persons who may sue under section 1981 to persons in the contractual relationship." Pet. App. 5. The court further held that while JWM might have a claim under § 1981, "a president or sole shareholder may

not step into the shoes of the corporation and assert that claim personally." Pet App. 7. The court granted the motion and dismissed the complaint with prejudice. *Id.*

Proceedings On Appeal

The Ninth Circuit reversed in an unpublished summary order. Pet. App. 1-2. The court ruled that it was bound to follow a prior Ninth Circuit case, *Gomez v. Alexian Brothers Hospital*, 698 F.2d 1019 (9th Cir. 1983). Because the Ninth Circuit's opinion in this case simply defers to *Gomez* as controlling circuit precedent, Petitioners will summarize that case briefly.

In *Gomez*, an Hispanic physician who practiced medicine as an employee of a professional corporation brought suit when the defendant hospital rejected the corporation's contract to operate its emergency room for allegedly racial reasons. After the district court dismissed the physician's complaint for lack of statutory standing, the court of appeals reversed. Analyzing the physician's claim under Title VII, the court first ruled that he had alleged sufficient injury-in-fact, because he had alleged injuries that were distinct from that of the corporation, including loss of employment, and "humiliation and embarrassment." 698 F.2d at 1021. The court noted that "[t]he same discriminating conduct can result in both corporate and individual injuries." *Id.* The court also held that the plaintiff had stated a claim under Title VII. By declining his corporation's offer, the hospital had injured the plaintiff's employment relationship with his own corporation, because "[t]he conditions of plaintiff's employment are different than they would have been had he not been discriminated against." *Id.* Although the *Gomez* court's entire analysis focused on Title VII, the court reasoned that "[t]he same is true of plaintiff's claim under §§ 1981 and 1985(3). 'The guarantees of § 1981 and Title VII against racial discrimination are coextensive.'" *Id.* at 1022 (citation omitted).

The Ninth Circuit held in this case that *Gomez* compelled it to permit McDonald's claim to proceed. It noted that "[w]hile a shareholder cannot maintain a civil rights action for injury suffered only by the corporation, *see Erlich v. Glasner*, 418 F.2d 226, 228 (9th Cir. 1969), we have acknowledged that '[t]he same discriminatory conduct can result in both corporate and individual injuries.'" Pet. App. 1-2 (quoting *Gomez*, 698 F.2d at 1021 (alteration in original)). The court then held that although its "sister circuits may reach a contrary result," nevertheless "*Gomez* squarely controls this case. While McDonald was not formally a party to the contract, he may nonetheless sue under § 1981 insofar as he seeks recovery for individual injuries separate and distinct from contract damages suffered by JWM Investments, Inc." Pet. App. 2.

SUMMARY OF ARGUMENT

42 U.S.C. § 1981 is the present codification of our Nation's oldest civil rights statute, the Civil Rights Act of 1866. It guarantees to every person "the same right ... to make and enforce contracts ... as is enjoyed by white citizens." But plaintiff John McDonald does not claim that his own right "to make and enforce contracts" was denied or infringed in any way. He alleges no contract to which he was personally a party, or wished to be. The gravamen of McDonald's complaint is, instead, that he suffered various "individual" emotional injuries when Domino's terminated a contract *with JWM* for allegedly discriminatory reasons.

The Ninth Circuit apparently believed that anyone can bring suit if they can allege a discrete, "individual" injury causally traceable to a violation of a federal statute. That is incorrect. A distinct injury fairly traceable to the defendant's conduct is the constitutional minimum for standing; it establishes that Congress *could* grant a person in plaintiff's position a right to judicial relief. But whether Congress *did* grant this plaintiff a right to judicial relief is

ultimately a question of statutory interpretation. And in the absence of some clear expression of congressional intent to the contrary, this Court always presumes that plaintiffs cannot assert the rights of third parties, and that they must be within the "zone of interests" protected by the statute in order to sue.

McDonald lacks "statutory standing" to sue (or, put more simply, any federal cause of action) under § 1981. That statute grants a powerful but specific set of rights—*inter alia*, a right to "make and enforce contracts" free from racial discrimination. It does not guarantee a right to be free from the collateral consequences of racial discrimination in the contractual relationships of third parties. In *Warth v. Seldin*, 422 U.S. 490 (1975), this Court held that taxpayers in the city of Rochester lacked standing under § 1981 to claim that their own taxes were higher because exclusionary zoning in a neighboring municipality denied low-income persons the ability to "make ... contracts" for housing there. McDonald is similarly "asserting the rights or legal interests of others in order to obtain relief from injury to [himself]," 422 U.S. at 509, and therefore his claim must also be dismissed.

To the extent McDonald's claim has any superficial appeal, it arises solely from the fact that the third party whose § 1981 rights were allegedly violated in this case happens to be his own, wholly-owned corporation. But doing business through the corporate form, and thereby insulating himself from any personal contractual relationships that could have supported a claim under § 1981, was entirely McDonald's choice. And there is no coherent distinction between large corporations and small ones in this context. If McDonald's claim is permitted, then every shareholder, employee, or bystander who can claim to have suffered "individual" damages, including emotional distress, traceable to an allegedly discriminatory breach of

contract between IBM and General Motors will have standing to sue. That would be a radical and profoundly disruptive innovation.

The Ninth Circuit's decision should be reversed, and the district court's dismissal of this lawsuit should be reinstated.

ARGUMENT

I. A DISCRETE "INDIVIDUAL" INJURY DOES NOT CREATE STATUTORY STANDING OR A FEDERAL CAUSE OF ACTION

The Ninth Circuit believed that McDonald could pursue a claim because he had alleged "individual injuries separate and distinct from contract damages suffered by JWM Investments, Inc." Pet. App. 2. That holding misunderstands the nature of the statutory standing inquiry, and ignores the plain language of § 1981.

"[T]he question of standing is whether the litigant is entitled to have the court decide the merits of the dispute or of particular issues." *Warth v. Seldin*, 422 U.S. 490, 498 (1975). It involves "both constitutional limitations on federal-court jurisdiction and prudential limitations on its exercise." *Id.*

The constitutional limits on standing flow from Article III's case or controversy requirement. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). Article III standing requires that: (1) the plaintiff have suffered an injury in fact that is both concrete and particularized, and actual or imminent; (2) the injury be fairly traceable to the acts of the defendant; and (3) it is likely, as opposed to conjectural, that the injury will be resolved by a favorable decision. *Id.* If a plaintiff does not satisfy that test, then Congress *cannot* grant them any federal cause of action—because deciding the case would force the federal courts to exceed their constitutional power. It is undisputed that McDonald could have standing under Article III. Accepting his allegations as true, he claims concrete injuries that were allegedly

caused by Domino's termination of the JWM contracts, and those injuries would be redressed by the monetary damages he seeks.

But the presence of Article III standing establishes only that Congress *could* grant McDonald a right to judicial relief in these circumstances; it does not establish that such relief is, in fact, available. A plaintiff suing under a federal statute must also demonstrate that the statute grants "statutory" or "prudential" standing. That is a question of statutory interpretation. "[W]hether the litigant is a 'proper party to request an adjudication of a particular issue' is one within the power of Congress to determine." *Sierra Club v. Morton*, 405 U.S. 727, 732 n.3 (1972) (citation omitted). Because "[s]tatutory rights and obligations are established by Congress, ... it is entirely appropriate for Congress, in creating these rights and obligations, to determine in addition who may enforce them and in what manner." *Davis v. Passman*, 442 U.S. 228, 241 (1979).

The "statutory standing" inquiry is therefore deeply intertwined with whether the statute grants the plaintiff a cause of action at all. As this Court recently explained, "[t]he question whether *this* plaintiff has a cause of action under the statute, and the question whether *any* plaintiff has a cause of action under the statute are closely connected—indeed, depending upon the asserted basis for lack of statutory standing, they are sometimes identical, so that it would be exceedingly artificial to draw a distinction between the two." *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 97 n.2 (1998).[2] This Court's modern "right of

[2] *See also Steel Co.*, 523 U.S. at 117-18 (Stevens, J., concurring in the judgment) ("[I]t is also possible to characterize the [statutory standing] issue in this case as whether respondent's complaint states a 'cause of action.'"); *Davis*, 442 U.S. at 239 n.18 (noting that "*cause of action* is a question of whether a particular plaintiff is a member of the class of litigants that may, as a matter of law, appropriately invoke the power of the court"); Stephen G. Breyer & Richard B. Stewart, *Administrative Law and Regulatory Policy: Problems, Text, and Cases* 1094 (2d ed. 1985) ("When a plaintiff seeks standing on the basis that an interest is protected by statute, the question whether that interest is legally protected for standing purposes is the same as the question whether plaintiff (assuming his or her factual allegations are true) has a claim on the merits.").

action" cases recognize that "[t]he judicial task is to interpret the statute Congress has passed to determine whether it displays an intent to create not just a private right but also a private remedy." *Alexander v. Sandoval*, 532 U.S. 275, 286 (2001).[3] Like the "statutory standing" analysis, that inquiry ultimately reduces to whether the "statutory provision on which the claim rests properly can be understood as granting persons in the plaintiff's position a right to judicial relief." *Warth*, 422 U.S. at 500.

This Court does not, however, approach that interpretive task from a blank slate in every case. It has recognized several "prudential" presumptions about when Congress intends to grant statutory standing to sue, including a presumption that "the plaintiff generally must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties," *Warth*, 422 U.S. at 499, and a presumption that a plaintiff will not have standing to sue unless his complaint falls within "the zone of interests to be protected or regulated by the statute or constitutional guarantee in question," *Ass'n of Data Processing Serv. Orgs. v. Camp*, 397 U.S. 150, 153 (1970).

The presumption that a plaintiff cannot ordinarily assert the legal rights of third parties serves two principal purposes. "First, the courts should not adjudicate such rights unnecessarily, and it may be that in fact the holders

[3] This Court has repudiated its prior expansive approach to implying federal causes of action, under which the courts had been "'alert to provide such remedies as are necessary to make effective the congressional purpose.'" *Sandoval*, 532 U.S. at 287 (quoting *J. I. Case Co. v. Borak*, 377 U.S. 426, 433 (1964)).

of those rights either do not wish to assert them, or will be able to enjoy them regardless of whether the in-court litigant is successful or not." *Singleton v. Wulff*, 428 U.S. 106, 113-14 (1976). And second, because "third parties themselves usually will be the best proponents of their own rights," both the courts and those third parties generally prefer for legal rights to be construed only "when the most effective advocates of those rights are before [the court]." *Id.* at 114. The "zone of interests" test serves similar purposes by ensuring that statutory rights or duties are enforced by the plaintiffs that the statute was intended to protect.[4] Those rules combine to produce the principle that

[4] Most of this Court's "zone of interest" cases have been decided in the administrative law context, where the Administrative Procedure Act grants standing to any person "adversely affected or aggrieved by agency action within the meaning of a relevant statute." 5 U.S.C. § 702. Against the backdrop of the APA's "generous review provisions," *Camp*, 397 U.S. at 156, this Court has frequently stated that a plaintiff has standing to challenge agency action so long as he or she is "*arguably* within the zone of interests to be protected or regulated by the statute," *id.* at 153 (emphasis added). That standard is certainly generous to potential plaintiffs, although by no means a free pass. *See, e.g., Air Courier Conference of Am. v. Am. Postal Workers Union*, 498 U.S. 517 (1991) (holding that Postal employees are not within the "zone of interests" protected by the statutes giving the U.S. Postal Service a monopoly over mail carriage in the context of an APA challenge); *Block v. Cmty. Nutrition Inst.*, 467 U.S. 340 (1984) (milk producers lack standing to challenge certain milk pricing orders by the Secretary of Agriculture). This Court has chosen to apply a similarly expansive analysis in cases where the cause of action arises directly under the Constitution, pursuant to its authority to interpret the constitutional text. *See, e.g., Boston Stock Exch. v. State Tax Comm'n*, 429 U.S. 318 (1977) (Commerce Clause). But this Court has recognized that the "arguably within the zone of interests" gloss does not apply to statutes outside of the administrative law context. "[W]hat comes within the zone of interests of a statute for purposes of obtaining judicial review of administrative action under the 'generous review provisions' of the APA may not do so for other purposes." *Bennett v. Spear*, 520 U.S. 154, 163 (1997) (citation omitted); *see also, e.g., Clarke v. Sec. Indus. Ass'n*, 479 U.S. 388, 400 n.16 (1987); Br. *Amicus Curiae* States at 5-10. Absent a separate extraordinary review provision like § 702 of the APA, the question is always whether the "statutory provision on which the claim rests properly can be understood as granting persons in the plaintiff's position a right to judicial relief." *Warth*, 422 U.S. at 500.

plaintiffs asserting some collateral injury caused by a violation of some *other* party's statutory rights generally lack standing.[5] *See Allen v. Wright*, 468 U.S. 737, 755-56 (1984).

Congress can, if it chooses, override these presumptions and expand standing out to the furthest limits permitted by Article III. Indeed, Congress knows exactly how to specify that result when it wishes. In *Bennett v. Spear*, 520 U.S. 154 (1997), for example, this Court held that the Endangered Species Act provision establishing that "any person may commence a civil suit" demonstrated a clear intent to permit enforcement by any injured citizen, even if the plaintiff did not suffer injuries to statutorily created rights. 520 U.S. at 164-65; *see also Gladstone, Realtors v. Vill. of Bellwood*, 441 U.S. 91 (1979) (Fair Housing Act). In the absence of such language, however, this Court presumes that Congress did not intend to deviate from the well-settled prudential limitations on statutory standing.

The Ninth Circuit's conclusion that McDonald suffered a "separate and distinct ... individual injury," Pet. App. 2, is therefore wholly insufficient to establish statutory standing or the existence of a cause of action. In addition to a discrete personal injury, McDonald must also establish that Congress intended to grant a person in his position a right to recover under § 1981—which (in the absence of statutory language expanding the usual standing rules) requires him to show that he is within the zone of interests protected by

[5] Although in the circumstances of this case McDonald's interests may be congruent with JWM's, this Court could not adopt one interpretation of § 1981 for single-shareholder corporations and another interpretation for all other contexts. There is no principled basis for treating shareholders of small corporations differently from shareholders of large ones.

the statute, and that he is asserting his own statutory rights rather than the rights of a third party.

II. SECTION 1981 DOES NOT AUTHORIZE SUIT BY PERSONS WHO HAVE NOT BEEN DENIED THE RIGHT TO "MAKE AND ENFORCE CONTRACTS"

The text, history, and consistent judicial interpretation of § 1981 make clear that it protects only the right to "make and enforce contracts" free from racial discrimination—and that the only persons with standing to sue under § 1981 are those who have actually suffered some injury to that right.

A. Section 1981 Protects Only A Specific, Personal Right To "Make And Enforce Contracts" Free From Discrimination

The text of 42 U.S.C. § 1981(a) provides that "[a]ll persons ... shall have the same right ... to make and enforce contracts ... as is enjoyed by white citizens." The right to "make and enforce contracts" is defined, in turn, to include "the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship." 42 U.S.C. § 1981(b). The plain language makes clear that the statute grants to every person the right to be free from racial discrimination in their own actual or prospective contractual relationships. The statute by its terms only provides redress for the discriminatory impairment of "[t]he rights protected by this section." 42 U.S.C. § 1981(c). It does not grant a cause of action for all injuries caused by discrimination in the contractual relationships of others.

The legislative history and consistent judicial interpretation confirm that conclusion. "The legislative history of the 1866 Act clearly indicates that Congress intended to protect a limited category of rights, specifically defined in terms of racial equality." *Georgia v. Rachel*, 384 U.S. 780, 791 (1966). The language of the statute traces its

origin to § 1 of the Civil Rights Act of 1866 ("the 1866 Act") ch. 31, 14 Stat. 27, which was enacted shortly after the ratification of the 13th Amendment.[6] *See, e.g., Gen. Bldg. Contractors Ass'n v. Pennsylvania*, 458 U.S. 375, 384 (1982). The language of the 1866 Act was re-codified in virtually identical form as part of the Enforcement Act of 1870,[7] and is now 42 U.S.C. § 1981(a).

"The principal object of the [1866 Act] was to eradicate the Black Codes, laws enacted by Southern legislatures imposing a range of civil disabilities on freedmen." *Gen. Bldg.*, 458 U.S. at 386; *see also* Cong. Globe, 39th Cong., 1st Sess. 474 (1866). The paradigm concern of the 1866 Act thus was the abolition of state-created restrictions on "the right to make and enforce contracts." Cong. Globe at 476. Notably, Congress removed a broad opening declaration to

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[6] Section 1 of the 1886 Act read in part: "That all persons born in the United States and not subject to any foreign power, ... are hereby declared to be citizens of the United States; and such citizens, of every race and color, without regard to any previous condition of slavery or involuntary servitude, ... shall have the same right, in every State and Territory in the United States, to make and enforce contracts, to sue, be parties, and give evidence, to inherit, purchase, lease, sell, hold, and convey real and personal property, and to full and equal benefit of all laws and proceedings for the security of person and property, as is enjoyed by white citizens, and shall be subject to like punishment, pains, and penalties, and to none other, any law, statute, ordinance, regulation, or custom, to the contrary notwithstanding."

[7] The text of the Enforcement Act differed slightly in two respects. First, while the 1866 Act applied to "citizens, of every race and color," the 1870 Act—and § 1981—protects "all persons." *See Gen. Bldg.*, 458 U.S. at 385; *United States v. Wong Kim Ark*, 169 U.S. 649, 675 (1898). Second, the Enforcement Act omitted language from the 1866 Act regarding property rights that was later codified at 42 U.S.C. § 1982. "Thus, '[although] the 1866 Act rested only on the Thirteenth Amendment ... and, indeed, was enacted before the Fourteenth Amendment was formally proposed, ... the 1870 Act was passed pursuant to the Fourteenth, and changes in wording may have reflected the language of the Fourteenth Amendment.'" *Gen. Bldg.*, 458 U.S. at 386 (quoting *Tillman v. Wheaton-Haven Recreation Ass'n*, 410 U.S. 431, 439-40 n.11 (1973)) (alterations in original).

the 1866 Act that would have stated that "there shall be no discrimination in civil rights or immunities among citizens ... on account of race, color, or previous condition of slavery." *Id.* at 1366. Out of concern that this language could be interpreted as encompassing a broader spectrum of rights, the language was deleted. *See id.* at 1367 ("To obviate that difficulty and the difficulty growing out of any other construction beyond the specific rights named in the section, our amendment strikes out all of those general terms and leaves the bill with the rights specified in the section."). As this Court has recognized, the removal of that passage "sharply undercuts the view that the 1866 Act reflects broader concerns" than the specific rights identified in its text. *Gen. Bldg.*, 458 U.S. at 388 n.15.

For the first century after its enactment, this Court apparently assumed that the substantive scope of § 1981 was limited to state action prohibited by the Fourteenth Amendment.[8] Several decades ago this Court recognized that § 1981 applies to private discrimination as well as to state action.[9] But it has nonetheless consistently described § 1981 as limited to interference (public or private) with the specific right to "make and enforce contracts." And in every case in which this Court has examined the scope of § 1981,

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[8] *See* George Rutherglen, *The Improbable History Of Section 1981: Clio Still Bemused and Confused*, 2003 Sup. Ct. Rev. 303; *Slaughter-House Cases*, 83 U.S. 36, 70 (1873); *Yick Wo v. Hopkins*, 118 U.S. 356, 369 (1886). That assumption flowed from this Court's holding in the *Civil Rights Cases*, 109 U.S. 3 (1883), that the public accommodations provisions of the Civil Rights Act of 1875 were unconstitutional as applied to private discrimination.

[9] In *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409 (1968), this Court held that § 1982, the companion statute to § 1981, protected against purely private discrimination in the sale or lease of property. Shortly thereafter, *Tillman v. Wheaton-Haven Recreation Ass'n*, 410 U.S. 431 (1973), held that both § 1981 and § 1982 applied to membership in a private, residential swimming pool.

the plaintiff was in a contractual relationship and alleged violation of a right to make or enforce a contract.

In *Johnson v. Railway Express Agency*, 421 U.S. 454 (1975), a railroad employee sued his employer and his union alleging that the railroad's seniority rules and job assignments were tainted by racial discrimination, and that the union maintained racially segregated membership. He alleged that these policies had injured his employment and union contracts in violation of § 1981 and Title VII. The plaintiff in *Johnson* fell squarely within the plain terms of § 1981, because he sued to "enforce" his employment contract with his employer and his contract with his union. And this Court recognized that the statute "on its face relates primarily to racial discrimination in the making and enforcement of contracts." *Id.* at 459.

In *Runyon v. McCrary*, 427 U.S. 160 (1976), the plaintiffs were a group of children who sued a private school for discriminating against African-American applicants. The plaintiffs alleged a straightforward violation of their own right to "make" contracts with the school, and this Court noted that § 1981 forbids only interference with the specific "rights enumerated" in the text of the statute. *Id.* at 170-71; *see also, e.g., Burnett v. Grattan*, 468 U.S. 42, 44 n.2 (1984) ("Title 42 U. S. C. § 1981 guarantees the right to be free from racial discrimination in specific activities, such as making contracts and bringing suit.").

In *General Building Contractors Ass'n v. Pennsylvania*, 458 U.S. 375 (1982), this Court again clarified that § 1981 creates only a narrow, specifically defined cause of action. The plaintiffs in *General Building Contractors* argued that liability could be imposed against construction trade associations for the discrimination of a union to which the associations had delegated the authority to hire workers through a hiring hall. This Court held that the trade associations were not liable under § 1981 because they had

not violated or interfered with anyone's right to "make and enforce contracts" free from racial discrimination. This Court explained that § 1981 did not create any duty to ensure that *others* do not discriminate in their contractual relationships. 458 U.S. at 395-96.

This Court's most extensive discussion of § 1981's scope came in *Patterson v. McLean Credit Union*, 491 U.S. 164 (1989). The plaintiff in *Patterson* was an employee who alleged that she suffered harassment, was not promoted, and was ultimately terminated from her job because of her race. Accepting those allegations as true, this Court nonetheless held that the conduct she complained of did not "fall[] within one of the enumerated rights protected by § 1981." 491 U.S. at 176. It emphasized that "[t]he most obvious feature of [§ 1981] is the restriction of its scope to forbidding discrimination in the 'mak[ing] and enforce[ment]' of contracts alone. *Where an alleged act of discrimination does not involve the impairment of one of these specific rights, § 1981 provides no relief.*" *Id.* (alterations in original) (emphasis added). This Court then held that the right to "make" contracts protects only the formation of contracts, and that the right to "enforce" contracts guarantees nothing more than access to the courts. *Id.* at 176-77. Thus Ms. Patterson's racial harassment and termination claims were not cognizable under § 1981 because such post-formation conduct did not involve either a refusal to make a contract with her or the denial of her ability to enforce her contract rights by judicial process. *Id.* at 177-78.

Shortly after the Court issued its opinion in *Patterson*, Congress altered the meaning of "make and enforce" in the Civil Rights Act of 1991 by adding the current § 1981(b) definition. *See* S. Rep. No. 101-315, at 6 (1990). The right to "make and enforce contracts" free from racial discrimination now includes all aspects of the contractual relationship,

including post-formation contractual performance and termination. But the language Congress chose makes it clear that § 1981 is still limited to "the making, performance, modification, and termination *of contracts*," and protects the "benefits, privileges, terms, and conditions *of the contractual relationship*." 42 U.S.C. § 1981(b) (emphasis added).

Nor does anything in the legislative history of the 1991 Act suggest an intent to expand § 1981 beyond the contractual relationship and contract rights. The House Committee Report stated that it was simply codifying what it believed was the pre-*Patterson* view within the lower federal courts concerning the scope of § 1981: "Prior to the *Patterson* ruling, every federal court of appeals had held that section 1981 prohibits not just discrimination at the formation of an employment contract, but discrimination during the performance of that contract as well." H.R. Rep. No. 101-644, pt. 1, at 17 (1990).[10] Likewise, the Senate Committee Report consistently focuses on contracts: *E.g.*, "The Committee finds that there is a compelling need for legislation to overrule the *Patterson* decision and ensure that federal law prohibits all race discrimination *in contracts*." S. Rep. No. 101-315, at 14 (emphasis added).

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[10] *See, e.g., Rowlett v. Anheuser-Busch, Inc.*, 832 F.2d 194 (1st Cir. 1987); *Richards v. N.Y. City Bd. of Educ.*, 668 F. Supp. 259 (S.D.N.Y. 1987), *aff'd without op.*, 842 F.2d 1288 (2d Cir. 1988); *Liotta v. Nat'l Forge Co.*, 629 F.2d 903 (3d Cir. 1980), *cert. denied*, 451 U.S. 970 (1981); *Patterson v. Am. Tobacco Co.*, 535 F.2d 257 (4th Cir.), *cert. denied*, 429 U.S. 920 (1976); *Hernandez v. Hill Country Tel. Coop., Inc.*, 849 F.2d 139 (5th Cir. 1988); *Grubb v. W.A. Foote Mem'l Hosp. Inc.*, 533 F. Supp. 671 (E.D. Mich. 1981), *aff'd*, 759 F.2d 546 (6th Cir. 1985); *Hunter v. Allis-Chalmers Corp.*, 797 F.2d 1417 (7th Cir. 1986); *Taylor v. Jones*, 653 F.2d 1193 (8th Cir. 1981); *Satterwhite v. Smith*, 744 F.2d 1380 (9th Cir. 1984); *Foster v. MCI Telecomms. Corp.*, 773 F.2d 1116 (10th Cir. 1985); *Stallworth v. Shuler*, 777 F.2d 1431 (11th Cir. 1985); *Metrocare v. Wash. Metro. Area Transit Auth.*, 679 F.2d 922 (D.C. Cir. 1982).

Indeed, this Court has already recognized that the scope of § 1981 remains limited to contractual rights and the contractual relationship. In *Rivers v. Roadway Express, Inc.*, 511 U.S. 298, 303 (1994), the Court observed that the 1991 legislation "amended § 1981 to embrace all aspects *of the contractual relationship*, including contract terminations, [and thus] it enlarged the category of conduct that is subject to § 1981 liability." (Emphasis added.)

B. Section 1981 Does Not Grant Third-Party Standing To Persons Whose Own Right To "Make And Enforce Contracts" Has Not Been Violated

It is, therefore, well settled that § 1981 protects only an individual right to "make and enforce contracts" free from racial discrimination. The "zone of interests" protected by § 1981 is that right, nothing more and nothing less. And nothing in the statute suggests any intent by Congress to abrogate the ordinary prudential standing rules and permit suit by persons whose own right to "make and enforce contracts" has not been violated, merely because they have suffered some discrete injury traceable to the violation of *someone else's* rights under § 1981. Section 1981 does not contain any review provision comparable to the APA or the Endangered Species Act, that would authorize suit by "any person" harmed by a violation of its provisions. It grants a set of specific, personal rights—and grants statutory standing (or, put differently, a cause of action) only to persons who have suffered an injury *to those rights*.

Even if the text were unclear, there would be no reason to infer that the 1866 Congress intended to create a cause of action for derivative injuries. The nineteenth century common law drew a strong distinction between direct and derivative injuries, and the latter were not recoverable on proximate cause grounds. "Thus, a plaintiff who complained of harm flowing merely from the misfortunes visited upon a

third person by the defendant's acts was generally said to stand at too remote a distance to recover." *Holmes v. Sec. Investor Prot. Corp.*, 503 U.S. 258, 268-69 (1992); *see also, e.g., Associated Gen. Contractors of Cal., Inc. v. Cal. State Council of Carpenters*, 459 U.S. 519, 532 n.25 (1983) ("'*[Where] the plaintiff sustains injury from the defendant's conduct to a third person, it is too remote*, if the plaintiff sustains no other than a contract relation to such a third person, or is under contract obligation on his account, and the injury consists only in impairing the ability or inclination of such person to perform his part, or in increasing the plaintiff's expense or labor of fulfilling such contract ....'") (quoting 1 Jabez G. Sutherland, *Law of Damages* 55-56 (1882)).

This Court has consistently applied the canon that statutes "'are to be read with a presumption favoring the retention of long-established and familiar principles, except where a statutory purpose to the contrary is evident.'" *United States v. Texas*, 507 U.S. 529, 534 (1993) (citation omitted). In *Associated General Contractors* this Court "consider[ed] the contemporary legal context in which Congress acted" and held that the Clayton Act incorporated the common law prohibition on derivative injuries—even though the literal language of the Clayton Act authorized suit by any person "injured in his business or property by reason of anything forbidden in the antitrust laws." 459 U.S. at 529-32. If that language was not sufficient to demonstrate congressional intent to abandon traditional proximate cause principles, then certainly the text of § 1981 is not. Section 1981 on its face authorizes suit only by persons whose own right to "make and enforce contracts" has been violated.

Indeed, this Court squarely held in *Warth v. Seldin* that § 1981 does not create standing to sue for collateral or derivative injuries traceable to the violation of some other

party's rights to "make and enforce contracts." In *Warth*, a variety of plaintiffs alleged violations of their constitutional and statutory rights, including under § 1981, arising from zoning laws in the town of Penfield, New York that allegedly operated to exclude persons of low and moderate income from living in the town. Among the plaintiffs was a group of taxpayers from the neighboring city of Rochester, who alleged that their taxes were higher because of the exclusionary zoning in Penfield. This Court noted that those taxpayer plaintiffs could not "assert any *personal* right under the Constitution or any statute to be free of action by a neighboring municipality that may have some incidental adverse effect on Rochester." *Warth*, 422 U.S. at 509 (emphasis added). As a result, "the only basis of the taxpayer-petitioners' claim is that Penfield's zoning ordinance and practices violate the constitutional and statutory rights of third parties," namely the low-income persons excluded from Penfield. *Id.* This Court held that the taxpayers' claims fell "squarely within the prudential standing rule that normally bars litigants from asserting the rights or legal interests of others in order to obtain relief from injury to themselves." *Id.* And while Congress might abrogate that limitation by statute, "no statute expressly or by clear implication grants a right of action, and thus standing to seek relief, to persons in [their] position," including 42 U.S.C. § 1981. *Id.* at 510.

Consistent with that guidance, the First, Fifth, and Tenth Circuits have squarely held that the owner of a corporation—exactly like McDonald—cannot bring suit under § 1981 for "individual" injuries suffered in connection with a violation of the *corporation's* right to make and enforce contracts. In *Guides, Ltd. v. Yarmouth Group Property Management, Inc.*, 295 F.3d 1065 (10th Cir. 2002), the plaintiff's wholly-owned corporation did business as a retail store called the Africa House. The plaintiff brought a

claim individually and on behalf of her corporation under § 1981 alleging that the defendant shopping mall evicted the store because of her race. The Tenth Circuit affirmed the dismissal of her individual claim on the ground that she lacked standing under § 1981, because "the party seeking to contract with the defendants and to lease property, and thus the direct victim of the alleged discrimination, was [plaintiff's] corporation, Africa House, rather than [plaintiff] herself." *Id.* at 1072. The court held that she could not bring a claim for emotional distress because "her claim is derivative of that of Africa House." *Id.* at 1072-73.

In *Danco, Inc. v. Wal-Mart Stores, Inc.*, 178 F.3d 8 (1st Cir. 1999), *cert. denied*, 528 U.S. 1105 (2000), the First Circuit similarly upheld the dismissal of a president and sole shareholder's individual § 1981 claim because he was not a party to the relevant contract. The plaintiff was the owner of a corporation that contracted to maintain a parking lot for Wal-Mart. He brought a § 1981 claim alleging that Wal-Mart had created a racially hostile work environment. The First Circuit recognized that the corporation could bring a claim under § 1981, but held that the president and sole shareholder could not. "The same statutory language that gives a claim to Danco, as an independent contractor with Wal-Mart, precludes such a claim by [Danco's owner] unless he also had a contract with Wal-Mart. ... Nothing in section 1981 provides a personal claim, so far as its language is concerned, to one who is merely affiliated—as an owner or employee—with a contracting party that is discriminated against by the company that made the contract." *Id.* at 14.

The Fifth Circuit likewise has twice ruled that the president/owner of a corporation has no individual cause of action under § 1981 arising from alleged discrimination against the corporation. *Bellows v. Amoco Oil Co.*, 118 F.3d 268 (5th Cir. 1997), *cert. denied*, 522 U.S. 1068 (1998); *Searcy v. Houston Lighting & Power Co.*, 907 F.2d 562 (5th Cir.

1990), *cert. denied*, 498 U.S. 970 (1990). The *Bellows* court held that the owner's individual claim failed because his allegations only implicated his corporation's right to contract, and not his own. 118 F.3d at 276-77. The court relied on *Searcy*, which had denied standing to the president and founder of a corporation on the ground that the "discrimination alleged by Searcy can be asserted to invade the legal rights of [his corporation] only." 907 F.2d at 565.

Several circuits have also held that employment "testers," who pretend to seek employment to collect information about discriminatory hiring practices, lack standing to bring a claim under § 1981. Those courts have held that because testers do not have a genuine interest in employment themselves, they suffer no injury to their personal right to "make or enforce contracts" and thus fall outside the scope of § 1981—even though they undoubtedly suffer discrete, individual injuries (principally emotional distress and humiliation). As the Seventh Circuit put it, § 1981 "protects the right to enter into and preserve a contractual relationship, period. ... The class of persons who may bring suit is therefore limited to persons who actually wish to enter into (or remain in) that relationship." *Kyles v. J.K. Guardian Sec. Servs., Inc.*, 222 F.3d 289, 303 (7th Cir. 2000); *see also id.* at 302 (although plaintiffs alleged humiliation and emotional distress, "in terms of the essential right that section 1981 protects—the right to make and enforce a contract—[plaintiffs] suffered no injury"). And in *Fair Employment Council of Greater Washington, Inc. v. BMC Marketing Corp.*, 28 F.3d 1268, 1270-72 (D.C. Cir. 1994), the D.C. Circuit also held that employment testers do not suffer any injury cognizable under § 1981.[11]

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[11] The D.C. Circuit emphasized that its holding was entirely consistent with *Havens Realty Corp. v. Coleman*, 455 U.S. 363 (1982), in which this Court upheld tester standing under the Fair Housing Act, because the broader language of the Fair Housing Act explicitly conferred a cause of action. 28 F.3d at 1271-72.

The consensus view among the other courts of appeals is clearly correct. Section 1981 authorizes suit only by persons whose own right to "make and enforce contracts" has been infringed. It does not authorize suit for injuries caused by violations of a third party's rights under the statute.

III. MCDONALD LACKS STANDING OR A CAUSE OF ACTION UNDER § 1981

The district court correctly ruled that, because McDonald has alleged no injury to any actual or potential contractual relationship of his own, his § 1981 claim must be dismissed. Section 1981 simply "can[not] be understood as granting persons in the plaintiff's position a right to judicial relief." *Warth*, 422 U.S. at 500.

A. McDonald Was Not A Party To The Relevant Contracts

McDonald has suffered no injury to his personal right to "make and enforce contracts" free from racial discrimination, because he has not alleged any contract to which he was personally a party, or hoped to be a party. The only contracts at issue in this case are between two corporations, JWM and Domino's. McDonald has not alleged the existence of any other contract that might ground a cause of action under § 1981.[12] All rights and obligations

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[12] McDonald's complaint speaks only of the JWM-Domino's contracts as the source of his claims. *See* Pet. App. 11 (Domino's and JWM entered into contracts); *id.* at 14 (Domino's breached contracts with JWM); *id.* at 15 (describing cause of action, "JWM had contracts with Domino's"); *id.* at 16 (Domino's failed to perform its obligations under its contracts with JWM, in violation of § 1981); *id.* at 17 (seeking damages in the form of, *inter alia*, payments Domino's would have made under its contracts with JWM). His briefing has never strayed from that focus. McDonald's reply brief in the Ninth Circuit attempted to distinguish the Seventh Circuit's decision in *Kyles*, for example, only by arguing that "the *Kyles* Plaintiffs never sought a contractual relationship. Thus the case is distinguishable from the instant case in that here Plaintiff negotiated four lease contracts

under these contracts belong to JWM and not to McDonald. If JWM had breached the contracts, McDonald could not be sued for breach. And the allegations that Domino's breached those contracts were properly brought (and settled) by JWM. A violation of JWM's right to "make and enforce" these contracts would not, even if proven, establish any injury *to McDonald personally* that is cognizable under § 1981.

McDonald's status as president and sole shareholder does not affect this conclusion. *See Danco*, 178 F.3d at 14 (president and sole shareholder of contracting company may not bring individual claim asserting injury to company's contractual rights); *Searcy*, 907 F.2d at 565 (same). It is a fundamental tenet of corporate law that "[t]he contract of a corporation is the contract of the legal entity, and not of the shareholders individually," and that "a shareholder, even a principal or sole shareholder, has no individual cause of action against another who has a contract with the corporation." 1 William Meade Fletcher, *Fletcher Cyclopedia of the Law of Private Corporations* § 29, at 497, 500 (perm. ed., rev. vol. 1999). Nevada law, which presumably governs these contracts, follows this traditional rule. *See Marymont v. Nev. State Banking Bd.*, 111 P. 295, 299 (Nev. 1910) ("[W]henever a corporation makes a contract, it is the contract of the legal entity, of the artificial being created by the charter, but not the contract of the individual members ....") (citing *Bank of Augusta v. Earle*, 38 U.S. 519 (1839)).

It bears emphasis that McDonald himself *chose* to do business through JWM, precisely in order to avoid

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to construct restaurants for Domino's to lease. It was during his demand that Defendants execute the contracts according to the signed provisions that the egregious 'you people' remark occurred." Plaintiff-Appellant's Reply Br. at 7-8 (footnote omitted). The leases McDonald relies upon to distinguish *Kyles* were all between Domino's and JWM.

exercising his own personal right to "make and enforce contracts." The corporate intermediary he created insulated him from privity of contract with Domino's, and ensured that he would have no personal liability or duties. That structure proved to be wise from McDonald's perspective, as JWM has since defaulted on its obligations and declared bankruptcy. But after taking advantage of the corporate form to protect himself from contractual liability, McDonald cannot now turn around and bring a claim that relies on the existence of a personal contractual relationship that he successfully disclaimed for all other purposes.[13]

McDonald cannot escape that conclusion by arguing that he has rights under the JWM-Domino's contracts as a third-party beneficiary. First, it is by no means clear that third-party beneficiaries have any rights under § 1981. The text protects the right "to make and enforce contracts," which does not on its face suggest extension of rights to non-parties. As the States' *amicus* brief explains at length, third-party beneficiaries did not have any right to enforce a contract under the common law of contracts when the Thirty-Ninth Congress enacted the 1866 Act. There is no reason to think that Congress anticipated that the right to "make and enforce contracts" would extend beyond the

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[13] There are, of course, limited circumstances in which courts permit a corporation to be treated as its shareholders, under the "alter ego" or "veil piercing" doctrine. That doctrine applies when the shareholder is engaging in fraud and is abusing the corporate form. *See, e.g., Wallace ex rel. Cencom Cable Income Partners II v. Wood*, 752 A.2d 1175, 1183-85 (Del. Ch. 1999). It would make no sense to apply that doctrine in this context because it would serve to reward a shareholder with a new cause of action under § 1981 for successfully defrauding others. *See Kaplan v. First Options of Chicago, Inc. (In re Kaplan)*, 143 F.3d 807, 812 (3d Cir. 1998) ("[S]ince Kaplan chose to structure his business in the corporate form and received the benefits of that form by avoiding liability for MKI's debts, the derivative injury rule prevents him from piercing the corporate veil in reverse in order to recover individually for MKI's losses."). In any event, McDonald has never claimed that JWM was a sham, and should be estopped from doing so.

contracting parties. Even the 1991 Amendments only extended the scope of § 1981 to the limits of the "contractual relationship." Although they may have certain rights, third-party beneficiaries are not part of the "contractual relationship" even under modern law.

In any event, McDonald has no third party beneficiary rights. Even under the modern view, only *intended* beneficiaries of contracts have rights as third parties, and any intent to benefit the third party must appear on the face of the contracts. *See Lipshie v. Tracy Inv. Co.*, 566 P.2d 819, 824-25 (Nev. 1977) ("[T]here must clearly appear a promissory intent to benefit the third party, and ultimately it must be shown that the third party's reliance thereon is foreseeable.") (citations omitted); *see also Sherman v. British Leyland Motors, Ltd.*, 601 F.2d 429, 440 n.13 (9th Cir. 1979) (when corporation is party to contract, president/sole shareholder lacks standing to bring contract claim because he is at most an incidental beneficiary). McDonald has never alleged, and could not plausibly allege, that Domino's entered into contracts with JWM specifically in order to benefit McDonald personally. Indeed, any suggestion that the shareholders, officers or employees of a vendor or contractor are third-party beneficiaries of its contracts would throw commercial law into turmoil.

Because McDonald has no contractual rights under the JWM-Domino's contracts, he may not bring a suit arising from the termination of those contracts under § 1981.

B. Respondent's Allegation Of Individual Injuries Does Not Create Standing

McDonald claims to have suffered "individual" injuries separate and apart from any losses by JWM—principally "pain and suffering, emotional distress, and humiliation." Pet. App. 16. As explained above, however, a discrete injury "fairly traceable" to the acts of the defendant is the constitutional *minimum* for standing, *Lujan*, 504 U.S. at

560, but is not alone sufficient to establish statutory standing or a cause of action absent a clear expression of intent by Congress to expand standing to the constitutional limit. Absent such an expression, collateral, derivative injuries caused by a violation of someone else's statutory rights are not generally recoverable. McDonald therefore lacks standing under § 1981 for the same reason that this Court dismissed the § 1981 claims of the taxpayer plaintiffs in *Warth v. Seldin*: he is "asserting the rights or legal interests of others in order to obtain relief from injury to [himself]." 422 U.S. at 509.

McDonald's only response has been to change the subject. In his briefing to the Ninth Circuit, McDonald focused on the general rule of corporate law that a stockholder cannot maintain a personal action against a third party for harm caused to the corporation, and argued that his suit fell under an exception to that rule for cases in which the third party's actions that injure the corporation also cause separate and distinct injuries to the stockholder. *See, e.g., Kramer v. W. Pac. Indus., Inc.*, 546 A.2d 348, 351 (Del. 1988) (shareholders can bring individual claim if they suffer injuries "*directly or independently* of the corporation"). The Ninth Circuit accepted that argument, and held that "[w]hile a shareholder cannot maintain a civil rights action for injury suffered only by the corporation, ... '[t]he same discriminatory conduct can result in both corporate and individual injuries.'" Pet. App. 1-2 (citation omitted).

The Ninth Circuit missed the point. The corporate law prohibition against shareholders asserting claims for injury to the corporation is certainly relevant to this case, as is the related but broader principle that damages derivative of injuries to someone else cannot be recovered. Those rules provide independent reasons why most of McDonald's alleged injuries would not be recoverable *even if § 1981 did*

give him a cause of action. McDonald's various allegations of financial injury to JWM would, for example, certainly be barred by the corporate law rule even if otherwise viable under § 1981. To the extent that he claims to have lost "front pay," Pet. App. 17, that injury is plainly derivative of the injury to JWM.[14] The same is true of his "emotional distress" damages, to the extent that McDonald claims to have suffered emotional distress simply because Domino's breached its contracts with JWM. *See, e.g., Guides*, 295 F.3d at 1072 ("Foote alleged that she suffered emotional distress as a result of the defendants' actions. However, this distress arose from the failure of the defendants to contract with or lease to Africa House and was a product of the economic damages which were suffered by the corporation."); *Bellows*, 118 F.3d at 276-77 & n.27 (president and majority shareholder cannot sue under § 1981 for emotional distress stemming from discrimination against the corporation).

McDonald may be correct that, to the extent he claims emotional injuries from conduct actually directed *at him personally*, such as Phillips's alleged statement, those injuries may not be barred by corporate law or by the rule against derivative injuries. But that does not remotely establish that § 1981 gives him a cause of action to recover for those injuries. The general rule that a stockholder may not bring a direct action for injury to the corporation operates to preclude a stockholder's *otherwise viable* cause of action on the ground that it belongs, as a matter of

[14] As this Court explained in *Holmes*, one of the reasons for the rule against derivative claims was (and is) that "recognizing claims of the indirectly injured would force courts to adopt complicated rules apportioning damages among plaintiffs removed at different levels of injury from the violative acts, to obviate the risk of multiple recoveries." 503 U.S. at 269. Permitting an employee or shareholder to recover for "individual" losses that are the direct consequence of business setbacks suffered by their employer raises obvious risks of double recovery.

corporate law, to the corporation. *See* 12B William Meade Fletcher, *Fletcher Cyclopedia of the Law of Private Corporations* § 5908, at 430-33, § 5911, at 444-60 (perm. ed., rev. vol. 2000); *see also Erlich v. Glasner*, 418 F.2d 226, 228 (9th Cir. 1969) (shareholder may not bring individual action under Civil Rights Act for injury to corporation). The broader rule against derivative injuries similarly prevents a plaintiff *who can otherwise establish all of the elements of a viable cause of action* from recovering for damages that are derivative of harm done to someone else. Those principles may not independently bar all of McDonald's claims, but they are essentially irrelevant to the primary question presented in this case: whether § 1981 gives McDonald any right to judicial relief.

C. McDonald Has Not Alleged Any Viable Third-Party Interference Claim, And Could Not

This Court has suggested that § 1981 might permit a cause of action for interference with the right to "make and enforce contracts" by a third-party not actually in privity with the defendant. *See Warth*, 422 U.S. at 514 n.22; *see also, e.g., Sullivan v. Little Hunting Park, Inc.*, 396 U.S. 229, 237 (1969) (arguably permitting third-party interference claim under § 1982). But even if a third-party interference claim would be viable under § 1981 in an appropriate case, McDonald has not alleged such a claim and could not.

First, McDonald's complaint, even read in the most generous possible light, focuses exclusively on the JWM-Domino's contracts as the direct source of his injuries. *See* Pet. App. 15-16; *supra*, at 25-26. He does not allege that he was a party to any other contractual relationship that Domino's might have interfered with. Although the cursory reference to "front pay" in his prayer for relief might suggest an employment contract with JWM, McDonald never actually alleges such a relationship and there is no

reason to assume it. Courts have been reluctant to presume an employment contract between a corporation and its president/sole shareholder absent evidence that one exists. *See, e.g., Bellows.*, 118 F.3d at 275 ("Bellow's mere ownership interest in and position as president of PICI does not, in and of itself, suffice to establish a contractual relationship."); *cf.* 2 William Meade Fletcher, *Fletcher Cyclopedia of the Law of Private Corporations* § 266 (perm. ed., rev. vol. 1998) (officers are not as a matter of law employees and courts must look to context). There is no evidence or even allegation in this case that McDonald's economic relationship with JWM was anything other than the relationship between a corporation and its sole shareholder.

Second, § 1981 only protects plaintiffs from being *intentionally* deprived of their contract rights. *Gen. Bldg.*, 458 U.S. at 396. An employee might have a viable § 1981 third-party interference claim against a company contracting with his employer if, for example, the defendant asked the employer to fire the employee, or to staff the employee on a different project, because of his race, and the employer obliged. But McDonald's complaint does not remotely allege that Domino's *purpose* in terminating its JWM contracts was to induce JWM to violate any contractual commitments it had made to McDonald. Indeed, any such allegation would be facially absurd. As the president and 100% shareholder of JWM, McDonald completely controlled both sides of any (hypothetical) contractual relationship between JWM and himself. Domino's obviously knew that.

Third, to the extent that McDonald premises his claim to "individual injuries" on the fact that his day-to-day job responsibilities changed when JWM lost the Domino's contract, his claim could not genuinely state any interference with a term, condition, or benefit of any

hypothetical contract with JWM. Employers win or lose clients and contracts every day, and those gains and losses will always affect the specific tasks that their own employees will be performing. But no employee has a contractual entitlement to his employer winning any particular bid or retaining any particular client. *See, e.g., Bellows*, 118 F.3d at 276 ("While it may [be] true that Bellow's income suffered after Amoco allegedly interfered with his asserted contractual relationship with PICI, this loss of income was not a result of any change in his relationship or status with PICI—as he continued to be PICI's 51% owner, president, and chief executive officer—but rather was caused by the fact that PICI no longer received the same high volume of work from Amoco."). Stated differently, no one has the right to be free from alleged "interference" with their employment that does not actually impact their rights as an employee. *See, e.g.*, Restatement (Second) of Torts § 766 (1977) (recognizing liability for intentional interference with contract only if the defendant "caus[es] the third person not to perform the contract").

Finally, to the extent McDonald's claim is premised on emotional distress stemming from the alleged racially insensitive comment by Ms. Phillips, that comment could not have altered the "terms, and conditions" of McDonald's employment or of any other contractual relationship, as a matter of law.[15] The statutory definition of "make and enforce contracts" now includes "the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship." 42 U.S.C. § 1981(b). In this context Congress's use of the phrase "terms, and conditions" cannot

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[15] Her alleged statement that "I don't like dealing with you people anyway" was made to JWM's president during a conversation about the extensive disputes between JWM and Domino's. Pet. App. 12-13. It is not unmistakably discriminatory on its face.

have been an accident. That phrase also appears in Title VII. *See* 42 U.S.C. § 2000e-2(a)(1) (protecting the "compensation, terms, conditions, or privileges of employment"). This Court has already recognized that, in the context of employment contracts, Congress meant for the substantive rights protected by Title VII and § 1981 to be essentially identical. *See Johnson v. Railway Express Agency*, 421 U.S. 454, 459 (1975). When Congress extended § 1981 to cover the "terms, and conditions of the contractual relationship" in the Civil Rights Act of 1991, it therefore must have intended those words to have the same, well-understood meaning that they have in Title VII.

Under Title VII, the phrase "terms, [and] conditions ... of employment" serves to clarify that changes in working conditions violate the statute only if they rise to such a severe level that they change the character of the employment relationship itself. A change in the "terms and conditions" of employment would include, for example, "hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits." *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 761 (1998). It does not, however, encompass racially or sexually offensive statements or harassment in the workplace, even if that harassment causes emotional distress and humiliation, unless the conduct is "severe or pervasive enough to create an objectively hostile or abusive work environment." *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 21 (1993). That standard applies in racial harassment cases no less than in sexual harassment cases. *See Nat'l R.R. Passenger Corp. v. Morgan*, 536 U.S. 101, 115-16 & n.10 (2002).

Congress's use of the "terms, and conditions" language clearly indicates that the same standard should govern § 1981 claims, and McDonald cannot satisfy it. It is settled beyond question that one isolated comment does not make a

working environment severely or pervasively abusive. *See, e.g., Faragher v. City of Boca Raton*, 524 U.S. 775, 788 (1998) ("A recurring point in [our] opinions is that 'simple teasing,' offhand comments, and isolated incidents (unless extremely serious) will not amount to discriminatory changes in the 'terms and conditions of employment.'") (citation omitted). That should be even more true when, as here, the comment comes not from a supervisor or coworker but from an outsider to the employment relationship. McDonald's allegations concerning Ms. Phillips would therefore fail to allege any injury to his right to "make and enforce contracts" even if all of the other elements of a valid cause of action were present.

IV. ALLOWING MCDONALD TO SUE FOR THESE INJURIES WOULD UPSET THE BALANCE OF THE CIVIL RIGHTS LAWS

The fact that McDonald has no cause of action under § 1981 for his individual injuries does not suggest any gap in the coverage of the Nation's civil rights laws. It is entirely consistent with the comprehensive statutory regime Congress has enacted to combat racial discrimination, and with well understood state common law principles. Permitting McDonald's claim to proceed, however, would have far-reaching and disruptive consequences.

The law simply does not create a remedy for every harm. Even before *Cort v. Ash*, 422 U.S. 66 (1975), it was settled that there is not a private judicial remedy for every injury traceable to a violation of a federal statute. *See Alexander v. Sandoval*, 532 U.S. 275, 286-87 (2001). To the contrary, the general rule is that there is no cause of action to recover collateral, derivative injuries suffered by persons other than the person whose statutory rights were actually violated. And when the injury in question is "pain and suffering, emotional distress, and humiliation," Pet. App. 16, the law has always imposed strict limitations on recovery.

Indeed, a claim by an affiliate of a contracting party for emotional distress caused by a breach of contract is a complete stranger to the law.

McDonald could not sue Domino's under any contract theory because he is not in privity with Domino's and was not an intended third-party beneficiary of the JWM-Domino's contracts. And emotional distress is not generally compensable under contract law in any event. *See, e.g.*, Restatement (Second) of Contracts § 353 (1981).

Emotional distress damages can be recovered in tort, but generally only when incident to an actual physical injury. Recovery for purely emotional injuries under the tort of "intentional infliction of emotional distress" is permitted only when the emotional injury is "severe" and the defendant's conduct is both intentional and "extreme and outrageous." *See, e.g., Jordan v. State ex rel. Dep't of Motor Vehicles & Pub. Safety*, 110 P.3d 30, 52 (Nev. 2005). And when courts have permitted *negligent* infliction of emotional distress claims at all, that doctrine has been carefully cabined by doctrines limiting potential plaintiffs. *See, e.g., Consol. Rail Corp. v. Gotshall*, 512 U.S. 532, 545 (1994) ("No jurisdiction, however, allows recovery for all emotional harms, no matter how intangible or trivial, that might be causally linked to the negligence of another."). The three common tests require the plaintiff to prove either (1) that he also suffered contemporaneous physical injury caused by the defendant's negligence; (2) that he was in the "zone of danger" of actual physical injury; or (3) that he was a close relative of a victim seriously injured by the defendant's negligence and actually witnessed the injury. *Id.* at 546-49. Obviously McDonald could not satisfy any of these tests.

Federal civil rights law also imposes strict limitations on relief for purely emotional distress. As explained above, under Title VII an employee has no redress for emotional

injuries caused by racially offensive statements unless those statements are so severely or pervasively abusive as to create a hostile work environment. *E.g., Harris*, 510 U.S. at 21. The alleged comment by Ms. Phillips that McDonald claims caused him to experience emotional distress simply does not rise to that level, as a matter of law. A § 1981 cause of action in these circumstances would, therefore, be inconsistent with the background law that governs comparable claims in other contexts.

Allowing anyone collaterally injured by an alleged violation of § 1981 to sue under that statute would also radically expand the class of plaintiffs that can sue for discrimination under federal law. Although the unique circumstances of this case allow McDonald to claim that he was the direct target of the alleged discrimination, his theory of recovery cannot be limited to "sole shareholder" situations like this one. That theory—and the Ninth Circuit's holding—would extend a cause of action to *any* person suffering a discrete "individual" injury incident to a racially motivated breach of contract.

That class of potential plaintiffs is essentially limitless. The termination of any contractual relationship will have effects that ripple outward through the economy. When a general contractor loses a contract, that loss may also injure his wife and children, his employees, his subcontractors and their families and employees, the lumber supplier that would have sold to the subcontractor, the lumber supplier's own timber supplier, and so on forever. And the potential injuries extend even beyond persons in the direct chain of economic consequences. A bystander could suffer emotional distress injuries of the sort alleged by McDonald. *See, e.g., Bermudez v. TRC Holdings, Inc.*, 138 F.3d 1176, 1180-81 (7th Cir. 1998) (refusing to permit claim for emotional injury to bystander under Title VII). A right to be free from all collateral consequences of racial discrimination in the

private contracting behavior of others, anywhere in our vast economy, would therefore be an extremely radical innovation. This Court has repeatedly rejected any reading of the antitrust laws or of civil RICO that would raise the specter of such ever-expanding derivative liability, even though those statutes on their face grant standing to any person injured "by reason of" a statutory violation. *See, e.g.*, *Holmes*, 503 U.S. at 268-69; *Associated Gen. Contractors*, 459 U.S. at 532-33. And this Court has recognized that Congress intended § 1981 to create only a narrow, specific right to "make and enforce contracts" free from racial discrimination. *E.g.*, *Burnett v. Grattan*, 468 U.S. 42, 44 n.2 (1984) ("Title 42 U. S. C. § 1981 guarantees the right to be free from racial discrimination in specific activities, such as making contracts ....")

Permitting such collateral suits would also create a host of practical problems. For example, every employee of a large corporation would have standing to bring a lawsuit alleging that his or her employer lost a big contract for racially discriminatory reasons, even if the employer itself did not believe that allegation or simply preferred to preserve its relationship with the prospective client rather than litigate. It will also become essentially impossible to settle claims of discrimination in contracting—which, of course, includes essentially all ordinary employment discrimination claims given the overlap between § 1981 and Title VII. Defendants will have little incentive to buy peace with the alleged direct victim of the discrimination if all of the plaintiff's employees have their own "individual" claims for collateral injuries. The brief for the Equal Employment Advisory Council as *amicus curiae* explains the practical consequences of the Ninth Circuit's ruling in greater depth. Difficulties like these are precisely why this Court has always refused, in the absence of a clear statement from Congress, to permit plaintiffs to litigate the rights of third

parties not before the court. *E.g.*, *Singleton*, 428 U.S. at 113-14.

If there were any cognizable injury to the right "to make and enforce contracts" flowing from the termination of the JWM-Domino's contracts, that injury was suffered by JWM, not McDonald. JWM brought a breach of contract claim against Domino's and settled it. If JWM had wanted to join a claim under § 1981 to that breach of contract claim, it could have done so.[16] And if McDonald had wished to enter into a personal contractual relationship with Domino's himself, he possibly could have done that as well. The one thing he *cannot* do is use the corporate form to intentionally distance himself from any individual contractual relationship with Domino's, and then turn around and sue for injury to that contractual relationship in his personal capacity. McDonald himself has not suffered any injury to the specific interests protected by § 1981, and therefore cannot bring suit under that statute.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be reversed and the case remanded with instructions that it be dismissed.

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[16] The circuits are unanimous that a corporation can bring a claim under § 1981 based on allegations that its contractual rights were impaired due to racial animus towards its owner or employees. *See, e.g.*, *Danco*, 178 F.3d at 13-14; *Hudson Valley Freedom Theater, Inc. v. Heimbach*, 671 F.2d 702, 706-07 (2d Cir.), *cert. denied*, 459 U.S. 857 (1982); *Thinket Ink Info. Res., Inc. v. Sun Microsystems, Inc.*, 368 F.3d 1053, 1057-60 (9th Cir. 2004); *Guides*, 295 F.3d at 1072; *Gersman v. Group Health Ass'n*, 931 F.2d 1565, 1567-70 (D.C. Cir. 1991).

Respectfully submitted,

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